

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION

86 Civ. 9462 (DNE)

Plaintiff,

- against -

MICHAEL N. DAVID,

Defendant.

FINAL CONSENT
JUDGMENT OF
PERMANENT
INJUNCTION AND
OTHER RELIEF
AGAINST MICHAEL
N. DAVID

DEC 19 1986

I

Plaintiff Securities and Exchange Commission ("Commission"), having commenced this action by filing its complaint on December 8, 1986, charging defendant Michael N. David ("David") with violations of Sections 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §78j(b), Rule 10b-5 promulgated thereunder, 17 C.F.R. 240.10b-5, and Section 14(e) of the Exchange Act, 15 U.S.C. §78n(e) and Rule 14e-3 promulgated thereunder, 17 C.F.R. 240.14e-3, and there having been no trial with respect to these charges, and defendant David having executed the Consent and Undertakings which is annexed hereto and incorporated herein, having waived the entry of findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure ("F.R.C.P."), and the parties desiring to resolve the issue of permanent injunctive and other equitable relief in this matter, and defendant David having admitted to the in personam and subject matter jurisdiction of this Court, having admitted to the allegations contained in the Complaint, and having consented to the entry of this Final Consent Judgment Of Permanent Injunction and

A TRUE COPY
JAMES H. PARLSON, Clerk

FILE DIRECT DEPT. OF JUSTICE

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DEC 19 1986

Doc # 4

Other Relief Against Michael N. David ("Final Judgment") without further notice and there being no just reason for delay in the entry of this Final Judgment:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant David, his officers, agents, servants, employees, attorneys, and all persons in active concert or participation with him, and each of them, be and hereby are permanently enjoined and restrained from, directly or indirectly, singly or in concert, in connection with the purchase or sale of any security, by the use of any means or instrumentalities of interstate commerce or by the means or instruments of transportation or communication in interstate commerce, or of the mails, or the facilities of any national securities exchange:

- (1) employing any device, scheme or artifice to defraud;
 - (2) making any untrue statement of material fact or omitting to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
 - (3) engaging in any act, transaction, practice or course of business which operates or would operate as a fraud or deceit upon purchasers or upon any other persons,
- in violation of Section 10(b) of the Exchange Act, 15 U.S.C. §78j(b) or Rule 10b-5 promulgated thereunder, 17 C.F.R. §240.10b-5, by among other things:

- (a) purchasing or selling securities or causing such securities to be purchased or sold while in possession

of material, nonpublic information concerning publicly traded companies or actual or proposed business combinations, mergers, acquisitions or tender offers involving a public company, unless within a reasonable time prior to any such purchase or sale, such information and its source are publicly disclosed by press release or otherwise;

- (b) conveying or causing the conveyance of such information to persons whom he knows, or has reason to know, will purchase or sell securities of public companies involved in such mergers, acquisitions or tender offers, or negotiations, discussions or litigation involving such transactions or events; or
- (c) misappropriating, converting or obtaining by other illegal acts, in breach of a fiduciary duty, material nonpublic information concerning, inter alia, publicly traded companies or actual or proposed business combinations, mergers, acquisitions or tender offers involving a public company.

II

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant David, his officers, agents, servants, employees, attorneys, and all persons in active concert or participation with him, and each of them, be and hereby are permanently enjoined and restrained, directly or indirectly, in connection with any tender offer, request or invitation for tenders of the shares of an issuer, from

engaging in any fraudulent, deceptive, or manipulative act or practice by, among other things:

- (1) purchasing or selling or causing to be purchased or sold the securities sought or to be sought in such tender offer, or any security convertible into or exchangeable for any such security or any option or right to obtain or dispose of the foregoing securities, while in possession of material information relating to said tender offer which he knows or has reason to know is nonpublic and knows or has reason to know was acquired directly or indirectly from i) the offering person, ii) the issuer of the securities sought or to be sought by such tender offer, or iii) any officer, director, partner or employee or any other person acting on behalf of the offering person or such issuer, unless within a reasonable time prior to any such purchase or sale such information and its source are publicly disclosed, or they purchase any security while acting in the capacity of a broker or agent on behalf of the offering person or they sell any such security to the offering person; or
- (2) communicating material nonpublic information relating to a tender offer, which information he knows or has reason to know was acquired directly or indirectly from i) the offering person, ii) the issuer of the securities sought or to be sought in the tender offer, or iii) any person acting on behalf of the offering person or such issuer,

to any other person under circumstances in which it is reasonably foreseeable that such communication is likely to result in the purchase or sale of the securities in the manner described in paragraph II(1), above, of this Final Judgment

in violation of Section 14(e), 15 U.S.C. §78n(e), of the Exchange Act or Rule 14e-3, 17 C.F.R. §240.14e-3, thereunder.

III

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the annexed Consent and Undertakings of defendant David be, and the same hereby are, incorporated herein with the same force and effect as if fully set forth herein.

IV

IT IS FURTHER ORDERED ADJUDGED AND DECREED that defendant David shall comply with his undertakings as set forth in the attached Consent and Undertakings.

V

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant David shall disgorge \$50,000, such sum representing disgorgement of profits derived from certain securities transactions alleged in the complaint by persons who traded in an account, in which defendant David was to receive a portion of the profits, while in possession of material nonpublic information which defendant David misappropriated and conveyed to them improperly. Such funds are to be paid in the following manner:

- (1) \$2,000 to be paid on or before April 30, 1987;

- (2) \$5,000 to be paid on April 30 of each succeeding year for a period of 9 years; and
- (3) \$3,000 to be paid on or before April 30, 1997.

VI

IT IS FURTHER ORDERED ADJUDGED AND DECREED that in addition to the disgorgement required by paragraph V above, defendant David shall pay a civil penalty under the Insider Trading Sanctions Act of 1984 [Section 21(d)(2)(A) of the Exchange Act, as amended, 15 U.S.C. §78u(d)(2)(A)] (the "penalty"), due annually on April 30 of each year that he is required to pay disgorgement, if his gross income in the preceding calendar year equals or exceeds \$25,000. In such event, the penalty to be paid shall equal 5% of the difference between defendant David's gross income in the preceding calendar year and \$5,000. In no event shall the aggregate amount of the penalty to be paid by defendant David exceed \$100,000 or 2 times the disgorgement required pursuant to paragraph V.

VII

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all monies to be paid pursuant to paragraphs V and VI above of this Final Judgment shall be paid in the following manner:

- 1) Such monies shall be paid into the registry of this Court by certified check or money order, drawn to the order of "Clerk, United States District Court, S.D.N.Y.", whereupon the Clerk of this Court, or the financial Deputy Clerk, is hereby directed to deposit said check into an interest bearing account, in the name

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- . 2) A copy of each check to be paid pursuant to this Final Judgment shall be mailed on or before April 30 of each year that defendant David is required to pay disgorgement to the United States Securities and Exchange Commission, 26 Federal Plaza, New York, New York 10278. Attention: Division of Enforcement Litigation Clerk's Office.
- 3) Interest earned on the account shall be credited to the account, and shall thereafter be treated in the same manner as the deposited sum.

VIII

IT IS FURTHER ORDERED ADJUDGED AND DECREED that in the event any of the eleven (11) payments due under the disgorgement provision as contained in Paragraph V of this Judgment is in default, David shall have ten (10) days from such default to cure such delinquency. Should defendant David not cure such default within ten (10) days, the Commission may at any time thereafter, in its sole discretion under the then-existing circumstances, declare the entire \$50,000 disgorgement, minus any portion of the disgorgement already paid, due and payable thirty (30) days from the declaration date. David shall consent to the entry of a Default Judgment on the declaration date, noting his default and ordering the payment of the entire \$50,000 disgorgement, minus any portion of the disgorgement already paid. All such monies due are to be payable pursuant to Section VII of this Judgment.

IX

IT IS FURTHER ORDERED ADJUDGED AND DECREED that if any of the payments due under the civil penalty provision as contained in Paragraph VI of this Judgment is in default, David shall have ten (10) days from such default to cure such delinquency. Further, should defendant David not cure such default within the ten (10) days, the Commission may at any time thereafter, in its sole discretion under the then-existing circumstances, declare the entire \$50,000 disgorgement, minus any portion of the disgorgement already paid, and the amount of the civil penalty in default at that time, due and payable thirty days from the declaration date. David shall consent to the entry of a Default Judgment on the declaration date, noting his default on the civil penalty due and owing at that time and ordering the payment of that outstanding civil penalty as well as the entire \$50,000 disgorgement, minus any portion of the disgorgement already paid. All such monies due are to be payable pursuant to Section VII of this Judgment.

X

IT IS FURTHER ORDERED that the distribution of any monies paid by defendant David pursuant to paragraphs V, VI, VIII and IX of this Final Judgment shall be effected according to such plan or terms as will be submitted by plaintiff Securities and Exchange Commission, subject to the approval of this Court, with cost of administration and distribution, if any, to be paid from the deposited disgorgement, penalty plus interest accrued on such deposit. In no event shall any sums disgorged, penalty paid or

XI

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant David shall provide Plaintiff Securities and Exchange Commission with a copy of his Federal Income Tax Return as filed with the Internal Revenue Service, no later than April 30 for each year that he is obligated to make disgorgement pursuant to Paragraph V, regardless of whether his gross income is sufficient to require payment of penalties under paragraph VI. Defendant David's Federal Income Tax Returns shall be filed at Plaintiff Securities and Exchange Commission's New York Regional Office, 26 Federal Plaza, New York, New York 10278, Attention: Division of Enforcement Litigation Clerk's Office.

XII

IT IS FURTHER ORDERED ADJUDGED AND DECREED that this Court shall retain jurisdiction of this matter for all purposes.

XIII

IT IS FURTHER ORDERED that the movant serve copies of the signed order upon the clerk of the Court (Rm. #18) and upon the Cashier (Rm. #14).

IT IS EXPRESSLY DIRECTED pursuant to Fed. R. Civ. P. 54(b) that this judgment be entered.

Rec'd \$400. H/8/95
28

Dated: New York, New York
December 18, 1986

Norman E. Edelstein
UNITED STATES DISTRICT JUDGE

RECEIVED CHECK NO. 203734 DATED 5-4-88
IN THE AMOUNT OF 5,000.00
PAYABLE TO M. H. T.

RECEIVED CHECK NO. 203734 DATED 5-1-87
IN THE AMOUNT OF 2,000.00
PAYABLE TO M. H. T.

THIS DOCUMENT
ON FILE IN THE
733-34

Dep. 5/4/87

Dep. 5-6-88

CONSENT AND UNDERTAKINGS
OF DEFENDANT MICHAEL N. DAVID

1. Defendant Michael N. David ("David"), having read and understood the terms of the annexed Final Judgment and Order of Permanent Injunction by Consent ("Final Judgment"), appears and admits to the in personam jurisdiction of this Court over him and to the jurisdiction of this Court over the subject matter of this action, waives the filing of Findings of Fact and Conclusions of Law pursuant to Rule 52 of the Federal Rules of Civil Procedure with respect to the entry of the annexed Final Judgment, and hereby consents to the entry of the annexed Final Judgment without further notice and admits to the allegations contained in the Complaint of plaintiff Securities and Exchange Commission ("Commission").

2. Defendant David agrees that this Consent ("Consent") shall be incorporated by reference in and made part of the Final Judgment to be entered against him.

3. Defendant David waives any right he may have to appeal from the annexed Judgment.

4. Defendant David enters into this Consent voluntarily and acknowledges that no tender, offer, promise or threat of any kind has been made by plaintiff Commission or any member, officer, agent or representative thereof, to induce his entering into this Consent.

5. Defendant David acknowledges that a violation of any of the terms or provisions of the Final Judgment may place him in

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contempt of this Court and subject him to civil and criminal
sanctions.

6. Defendant David further acknowledges that he has been informed and understands that plaintiff Commission, at its sole or exclusive discretion, may refer or grant access to this matter, or any information or evidence gathered in connection therewith or derived therefrom, to any person or entity having appropriate civil, administrative or criminal jurisdiction.

7. Defendant David further acknowledges that he has been informed that plaintiff Commission has not waived and does not waive its rights to commence, in its sole and exclusive discretion, any civil contempt or criminal contempt proceedings or actions against defendant David or other entities or persons as a result of this matter, or any information or evidence gathered in connection therewith or derived therefrom.

8. Defendant David further acknowledges that this Consent embodies the entire understanding of the parties.

9. Defendant David hereby consents and agrees that the annexed Final Judgment may be presented by the Commission to the Court for signature and entry without further notice.

10. Defendant David further consents that this Court shall retain jurisdiction in this matter for all purposes.

11. Defendant David agrees that he will be available upon reasonable notice to his attorney of record herein to meet with attorneys for the Securities and Exchange Commission and to disclose truthfully all information about which Plaintiff Commission or its staff may inquire; and that he will appear and testify

12. David acknowledges that he has provided Plaintiff Commission with a sworn Financial Statement dated November 25, 1986, which accurately reflects David's total assets and liabilities as of that date.

Michael N. David
MICHAEL N. DAVID

Dated: New York, New York
December 18, 1986

STATE OF New York)
COUNTY OF New York) ss.:

On this 18th day of December, 1986, before me personally appeared MICHAEL DAVID, to me known, and known to me to be the person who executed the foregoing Consent and he acknowledged to me that he executed the same.

Maria Riordan
NOTARY PUBLIC

MARIA RIORDAN
NOTARY PUBLIC, State of New York
No. 03-4839789
Qualified in Bronx County
Commission Expires March 30, 1987

Rec'd on 5-2-88 the
Amount of \$5,000.00 in
Form a check Deposited
into Savings A/c

4-28- Rec'd on 4/28/87 amount of
\$2,000.00 from Michael N. David, se

5/4/87- Deposited ch # 103734 in the
a. account of \$2,000.00 a savings
A/c at CITI T-Co. se